(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

Date: AUG 2 3 2013 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Elizabeth M'Cormack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a pharmacy. It seeks to employ the beneficiary permanently in the United States as a pharmacist pursuant to Section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to demonstrate its ability to pay the proffered wage and that the petitioner, was the same entity as The director denied the petition on February 13, 2012.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which is the day the ETA Form 9089 was accepted for processing. See 8 C.F.R. § 204.5 (d). Here, the ETA Form 9089 was accepted on March 24, 2011 and the proffered wage is $90,813 per year.

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In determining the petitioner's ability to pay the proffered wage during a given period, United States Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has provided a copy of the beneficiary's 2012 Internal Revenue Service (IRS) Form W-2 issued by the petitioner in the amount of $31,435.20 which established that it employed and paid the beneficiary less than the full proffered wage in 2012.

The record before the director closed on December 5, 2011 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2011 federal income tax return was not yet due. On appeal, the petitioner's tax return for 2011 was submitted which demonstrates its net income for 2011. Further, in response to the AAO's request for evidence (RFE), the petitioner has provided its 2012 federal tax returns, which shows its net income in the table below.

- In 2011, the Form 1120S stated net income[2] of $120,722.
- In 2012, the Form 1120S stated net income of $93,043.

Therefore, for the year 2011 and 2012, the petitioner has sufficient net income to pay the proffered wage.

Next, in the AAO's RFE, we sought evidence that the beneficiary has maintained a pharmacist license with the state of California. Based on the petitioner's evidence submitted in response to the RFE, the petitioner has established that the beneficiary is licensed by the state of California as a pharmacist from the priority date through the present.

Further, the director found that the identity of the petitioner was not established, as business names were found on the petition and the labor certification. Upon review we find it more likely than not that the business names listed on the labor certification, the petition, the appeal, and on the petitioner's United States tax returns belong to the petitioner herein. There is no ambiguity about the identity of the petitioner.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

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[2] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2006-2011) of Schedule K. Because the petitioner had additional income, credits, deductions, and other adjustments shown on its Schedule K for 2011 and 2012, the petitioner's net income is found on Schedule K of its tax return for both years.

ORDER: The appeal is sustained, and the petition is approved.